PUBLIC PROSECUTOR v. KU HANG CHUA

[O.Cr.J. (Yusoff J.) February 22, 1975]
[Sandakan — Criminal Trial No. 9 of 1974]

Criminal Law and Procedure — Rape — Consent of complainant — Corroboration of evidence of complainant — Penal Code, s. 376.

Evidence — Offences involving allegation of rape — Need for corroboration — Co-accused discharged not amounting to acquittal — Accomplice — Evidence excluded from consideration.

Penal Code, s. 376 — Rape — Evidence — Corroboration.

The accused was charged with rape. The crucial question was whether there was consent to the sexual intercourse. Another person was originally charged with abetting the offence of rape but the charge against him was withdrawn not amounting to an acquittal and he gave evidence for the prosecution.

Held: (1) in this case there was corroboration of the evidence of the complainant and the defence did not throw any reasonable doubts on the prosecution's evidence. Therefore the accused was found guilty and convicted;

(2) in this case as the accomplice had been discharged but not acquitted, his evidence should be excluded from consideration.

Cases referred to:-

(1) *Din* v. *Public Prosecutor* [1964] M.L.J. 300, 301.
(2) *R.* v. *Baskerville* [1916] 2 K.B. 658, 667.
(3) *R.* v. *Pipe* (1967) 51 Cr. App. Rep. 17.
(4) *Reg.* v. *Turner and others Times*, 24th March 1975.
(5) *Chiu Nang Hong* v. *Public Prosecutor* [1965] M.L.J. 40, 42.

CRIMINAL TRIAL.

Stephen Foo Kiat Shin (Deputy Public Prosecutor) for the prosecution.

Joseph Pairin Titingan for the first accused.

P. V. Yap for the second accused.

Yusoff J.: The accused is charged with an offence of rape contrary to section 376 of the Penal Code, allegedly committed by him on a 17 year old girl named Alice Lai Mui Ping in the early hours of the morning of June 12, 1974 at Sandakan. Originally charged with him was John Lu Su Thiam for abetting the same offence whose charge has been withdrawn by the prosecution and he now becomes a witness for the prosecution.

The complainant is an unmarried girl and unemployed, living with her parents at Mile 1½ North Road, Sandakan and whose father is a pensioner and mother selling vegetables.

Her evidence is that on the evening of June 11, 1974 she and her sister with some friends went out for a stroll in the town. One of the friends was Nancy Liew. After her sister and others had gone home she continued walking with Nancy Liew until about 1 o'clock in the morning (June 12, 1974) when they decided to go home. They waited for transport by the road side opposite the cinema theatre in the town while then a motorcar driven by accused with John Lu Su Thiam sitting beside him stopped not far away from them. Nancy Liew approached the motorcar and after some conversation with accused she called the complainant and they both entered the car. The complainant sat in the back seat with her.

After further conversation between accused and Nancy Liew, accused drove the car to a place called Sim Sim. On reaching there Nancy Liew went out and left the car. Accused then asked complainant where she wanted to go to which she replied that she wanted to return to Mile 1½ (North Road). The car proceeded to Mile 1½ but before reaching there accused said to complainant that he wanted to send his friend first to which complainant did not reply. Accused proceeded further along North Road and when he came to Mile 7 he branched onto an earth road and stopped the car after about 100 yards away from the main road. Accused persuaded complainant to take the front seat. She complied and sat between accused and John Lu on the front seat. After this accused drove the car further and stopped at a dark place. Complainant protested after finding that she was not to be sent home.

Now this place as is described later by Sgt. Major Anthony Loh (PW9) who visited the scene in the company of complainant and accused was a rubber plantation about ½ a mile away from an Army Complex which was then not occupied. There was no house within visible distance from the place.

While seated sandwiched between accused and John Lu in the front seat of the car both accused and John Lu started to fondle complainant's chest. She struggled and shouted for help. She threatened to report them to the police. Accused then kissed complainant on the mouth. She struggled again and when her mouth was free she said that she bit the accused's hand which was holding her upper arm. Under cross-examination there was some confusion as to which hand the complainant said she had bitten the accused. She said she had bitten him many times on the back of his palms. However, medical evidence of Dr. Mohamed Salleh Long (PW1) who had examined accused few hours later at Sandakan Govt. Hospital showed that there were in fact few minor scratches on both dorsum of accused's hands. These scratches were according to him, inflicted a few hours before and in the doctor's opinion they could have been caused by finger nails, but not caused by teeth. We will come to this later.

When she found herself free from the accused's hold the complainant climbed over to the back seat of the car, attempting to escape but she discovered that all the windscreens of the car were rolled up. Both the accused and John Lu quickly followed her also by similarly climbing over to the back seat. John Lu held both complainant's arms behind her back. She shouted for help. Accused took out a towel and tied it over her mouth. While in that position accused stripped complainant of her skirt and her underwear. She struggled but to no avail. Accused also stripped himself of his trousers and after doing so he asked John Lu to leave the car.

After John Lu had left accused pushed her body down on to the seat of the car forcing her to lie down. Her legs were rested in between the seats of the car. Accused then forced both the complainant's thighs apart with both his hands. Having done so he climbed on top of her and played with her private part with his hand and at the same time putting his finger into her vagina. He then raped her. Complainant said that she felt accused had inserted his penis into her vagina many times. It lasted for 5 to 10 minutes and she felt pain.

When John Lu returned to the car both the accused and complainant got up to put on their clothes. John Lu then drove the car back to the town while accused and complainant remained in the back seat. When they reached Mile 3 complainant said that the car was stopped at the police road block. She came out from the car and spoke to the policeman on duty there, P.C. 47797 Ismail (PW3) in Chinese, while holding her stomach and pointing to the accused in the car. But P.C. Ismail could not understand her and at that time another motorcar driven by a Chinese also stopped at the road block. P.C. Ismail took the complainant to the driver, Lee Vui Min (PW8), who interpreted to him what complainant had said in that that she alleged that she had been raped.

P.C. Ismail after making some inquiries arrested both the accused and John Lu and sent them to the police station. Complainant was also taken to the police station in Lee Vui Min's car in the company of a policeman. This was about 2.30 a.m. in the morning. From the police station she was taken to the Government hospital where she was examined by Dr. Mohamed Salleh Long (PW1) at 6.30 a.m. the same day.

Complainant also said that she wore a metal locket in the form of a cross (Ex. P7) tied to a chain around her neck when she went out that night and the locket was lost.

It is an established practice that in offences involving allegation of rape, the complainant's evidence must be corroborated not because of the nature of the witness but because of the nature of the offence itself.

As Thomson L.P. said in *Din* v. *Public Prosecutor*: (1)

"But the desirability for corroboration of the evidence of the prosecutrix in a rape case (which in any event has not yet crystallized into something approaching a rule of law and which is still a rule of practice and of prudence) springs not from the nature of the witness but from the nature of the offence. Never has it been suggested that the evidence of a woman as such invariably calls for corroboration. If a woman says her handbag has been snatched and if she is believed there can be no question of a conviction on such evidence being open to attack for want of corroboration. If, however, she complains of having been raped then both prudence and practice demand that her evidence should be corroborated."

The nature and extent of corroboration required in such cases are corroboration in material particular implicating the accused as laid down in *R.* v. *Baskerville*: (2)

"Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the prisoner committed it."

While examining other evidence to see whether the complainant's testimony is corroborated in material particular, it is best to proceed along the lines of what are required to be proved in such allegation. In my opinion, the prosecution has to prove firstly, that the complainant has been raped and secondly that it was the accused who raped her.

On the question of rape committed against the complainant there are substantial evidence to corroborate her testimony. There is the evidence of P.C. Ismail (PW3) who was on road block duty at Mile 3 at North Road that morning to show that the complainant has made a prompt and immediate complaint to him about the incident which had taken place only a few minutes before. The time factor is considered by the distance they had travelled by car from the scene of the incident at Mile 7 to Mile 3 which would have taken them reasonably in 10 minutes at the most. There is also P.C. Ismail's evidence describing the complainant's appearance at the time she made the complaint, saying that she was holding her stomach, her hair looked disordered and her dress ruffled. And P.C. Awang (PW5) who was also on duty at the same road block also noticed complainant's appearance. He said that she looked weak while holding her stomach and her hair was unkempt and her dress looked crumpled.

Conclusively of course, is the medical evidence of Dr. Mohamed Salleh Long who said that he examined the complainant at 6.30 a.m. (about four hours after the incident). He had taken a vagina swab from the complainant which was examined by his laboratory assistant, Chai Choy Sin (PW2) on which he found that there were few spermatozoa present on the swab. This according to the doctor confirms that the complainant had a recent sexual intercourse.

Nevertheless to constitute an offence of rape the sexual intercourse which the complainant had must be committed against her will or without her consent. Here again there are substantial evidence to corroborate her testimony. She said that she had struggled to free herself from the hold of John Lu and accused. She bit the accused's hands while he was holding her. She shouted for help a few times in which event the accused tied a towel on her mouth and she struggled again when accused forced open both her thighs before she was finally forced into submission and ravished by the accused. She said that she also lost her metal locket in the form of a cross which she had worn that night.

This locket Ex. P7 was recovered in the accused's motorcar when it was searched by Sgt. Major Anthony Loh (PW9) in the accused's presence on the same day. The Sgt. Major also recovered a towel — Ex. P6 from the car. These two items sufficiently corroborated the complainant's evidence that she had struggled and shouted for help which negatives any consent on her part before she was raped. But the evidence which can be relied upon most conclusively is again the medical evidence of Dr. Mohamed Salleh Long. He had examined complainant physically and found three small scratches marks on her right thigh. These scratches were fresh at the time of examination and in his opinion they could have been caused by finger nails in the course of a struggle. I am satisfied that all these evidence conclusively proved that the complainant was forced into submission before she finally became a victim of an outrage.

As regard the identity of the accused that is the second question that it was the accused who raped the complainant, the evidence shows that there were only three persons the accused, complainant and John Lu travelling in the car to the scene of the incident. The place was described as dark by the complainant yet she was positive that it was the accused who

raped her and not John Lu. Further evidence is of course desirable, how she could feel or see the accused's form or features in the darkness. Since those evidence were not forthcoming the court has to examine other corroborative evidence which could implicate the accused.

Again complainant said that she bit the accused's hand many times when he was fondling and kissing her while they were seated in the front seat of the car. While giving evidence in court she appeared to be confused as to which of the accused's hand she had bitten. But the evidence of Dr. Mohamed Salleh Long who examined accused at 11.00 a.m. on the same day showed that there were few minor scratches on both dorsums of his hands. These scratches were caused only a few hours before and in his opinion they could have been caused by fingernails. With this discrepancy I could not therefore accept this evidence as conclusive corroboration implicating the accused.

However, other evidence shows that both the accused and John Lu were arrested by P.C. Ismail only ten minutes after the incident when they drove straight from the scene to the police road block. Both of them were sent to hospital for medical examination. Medical evidence on the accused shows that his penis was elongated and there were some seminal fluid of white discharge in the urethacanal of his penis which confirmed that the accused had sperm discharge suggesting that he had a recent sexual intercourse. Whereas medical examination carried on John Lu did not show any sign that he had a recent sexual intercourse and that his penis looked normal. This evidence though circumstantial points irresistably to the conclusion that it was the accused who raped the complainant.

Further, there appears to be no motive for the complainant to incriminate the accused and the fact that she made the complaint almost immediately after the incident to P.C. Ismail, gives her no opportunity for reflection to falsely incriminate the accused out of remorse as suggested by the defence counsel.

I have excluded John Lu Su Thiam's (PW4) evidence entirely, though he gave evidence impressively in court which corroborates the complainant's evidence not only in material particular but also in detail; not because he is not competent to give evidence being himself an accomplice in the offence. But I consider the fact that the charge against him has been withdrawn by the prosecution at the last moment with the plea that he should not be acquitted and in fact he was not acquitted, gives rise to the inference that he was influenced by a continuing inducement to give favourable evidence for the prosecution. The inducement is too strong as it is coupled with a threat that proceedings would be continued against him at any time by the prosecution, to allow the court to admit his evidence.

In *R.* v. *Pipe*[3] it is adjudged that this practice has become the rule of law. The facts of that case showed that the prosecution called at the trial of the appellant an accomplice against whom proceedings had been brought, but had not been concluded. It was held that it was the duty of the prosecution if they were still minded to call the accomplice as a witness, to let it be known that in no event would proceedings against him be continued and as this had not been done, there had been a departure from the established rule of practice.

In *Regina* v. *Turner and Others*[4] reported in Times Law Report of March 24, 1975, Lord Justice Lawton is reported to have said while referring to the practice of granting immunity against prosecution or further prosecution that:

"It was in the public interest that criminals should be brought to justice; and the more serious the crimes the greater was the need for justice to be done. Employing Queen's evidence to accomplish that end was distasteful — to judges, lawyers and members of the public."

It is further reported that His Lordship distinguished this practice from doubting the well-established practice of calling accomplices on behalf of the Crown who had been charged in the same indictment as the accused and who had pleaded guilty.

Without admitting the testimony of John Lu (PW4), I am satisfied that there are sufficient evidence establishing a *prima facie* case against the accused. I called for his defence.

In his defence accused admitted that he had sexual intercourse with the complainant with full penetration of his male organ in the complainant's vagina for about ten minutes until he attained a discharge. However, he maintained that complainant had consented to the intercourse. He explained that although complainant was a stranger to him, yet she appeared friendly while they were driving to the scene and at one stage while he was fondling and kissing her, complainant embraced him around his shoulders. If these were true accused did not explain why he had afterwards to force complainant into having intercourse with him against her will.

The accused suggested that he would not know that complainant wanted to escape when she climbed over the back rest to the back seat of the car and yet there is no explanation why he and John Lu followed her in quick succession in similar manner. Further while they were at the back seat, he said that he instructed John Lu to hold complainant's arm behind her back and he held her shoulder and just as complainant shouted for help, he pressed a towel on her mouth. He said that he did all these as a joke. It is not reasonable and most difficult to believe that these were done in a sense of humour when these circumstances would indicate to any reasonable man that the complainant was in fear and was trying to escape.

Accused also suggested that complainant had consented to the intercourse when she told him that "If you want anything I could give you my whole body. It will be better for your friend to leave the car". In cross-examination he admitted that complainant had said this while he was playing with her private part in the presence of John Lu. If this is again true, it is more consistent with the fact that the complainant had at that time already resigned that she would be raped and that her words were her last appeal to the accused's human decency to refrain from doing it in the presence of someone. Any reasonable construction of these words if spoken by complainant

in those circumstances would not amount to her consent to the eventual rape.

It is also suggested by the accused that the scratches on the complainant's thigh could have been caused by her own fingernails. The defence counsel contends that she had long and sharp finger nails. The accused said that the complainant was covering her private part with her hands while he was inserting his finger into it. This could probably be true and in the event complainant might have inflicted her own injury while defending her chastity at the agonising moment while being molested by the accused.

In my opinion whether this injury was caused by the accused or by the complainant herself during the struggle preceding the rape is of no material importance. The fact remains that there was a mark on her thigh caused during the struggle. It is a corroborative evidence from a source independent of her which tends to show that she did not consent out of her free will. As said by Lord Donovan in *Chiu Nang Hong* v. *Public Prosecutor*: (5)

"The crucial question was whether the complainant consented, and the risk of convicting on her own evidence alone was clear. Some corroborative evidence was most desirable, that is to say, some evidence coming from a source independent of her, which tended to show that she did not consent of her own free will. She did not struggle or shout, she did not try to leave the room, her clothing remained intact, and her body unmarked. She made no complaint until after the lapse of nearly forty hours."

To explain the injuries on the dorsum of his hands the accused brought Tan Ngak Siong (DW1) the proprietor of the shop where he was working. This witness testified that there were no opening of boxes in his shop on June 11, 1974. He further said that he had imported 125 boxes of china-wares on the 6th or 7th of June. These boxes were opened on the same day they arrived. He also said that scratches to the hands sometimes minor and sometimes serious normally caused by metal bands tied around the boxes when opening them. He used to see these types of scratches on accused's both hands before which sometimes lasted for days. This witness however, did not explain how those scratches as found on accused's hands by Dr. Mohd. Salleh Long, were inflicted. These were only a few hours old, still fresh and remained unexplained reasonably.

Accused's wife Chin Kui Goon (DW2) also gave evidence, she stated that accused had never worn an underwear before because of his skin trouble. This probably explains the absence of any reference to his underwear throughout the proceeding which is not now material.

On the whole I find that the accused's story is not consistent and neither does it explain most of the incriminating evidence adduced by the prosecution against him. I am satisfied that the defence does not throw any reasonable doubt on the prosecution's evidence. I found him guilty and after conviction, I sentenced the accused to a period of imprisonment of 18th months which in the circumstances I find appropriate and reasonable.

Order accordingly.

Solicitors: *Shelley Yap & Co.; P. V. Yap & Co.*

KEE KENG MOW v. SETAPAK GARDEN ESTATE LTD.

[O.C.J. (Hashim Yeop A. Sani J.) February 22, 1975]
[Kuala Lumpur — Civil Suit No. 826 of 1971]

Interpretation — Construction of written agreements — Payment of proportion of outgoings — Plain and ordinary meaning.

The plaintiff had agreed by an agreement of sale that he "shall repay to the company such proportion of the total of such outgoings paid by the company in respect of the said land as the area or value of the said lot bears to the total area or value of the said land excluding the areas thereof reserved for roads, open spaces etc." The plaintiff contended that he should not be asked to pay the proportion that relates to the area of land which has been reserved for roads, open spaces, electrical substations and other communal amenities. The defendants claimed on the other hand that the outgoings should be shared between the defendant, the plaintiff and others who purchased lots from the defendant in that area. The plaintiff claimed that he had been made to pay more than his share and asked for repayment.

Held: the construction given by the plaintiff was inconsistent with the plain and ordinary meaning of the words in the agreement and therefore the plantiff's claim must be dismissed.

Cases referred to:-

(1) *Jagathesan* v. *Linggi Plantations Ltd.* [1969] 2 M.L.J. 253, 256.

(2) *Jagathesan* v. *Linggi Plantations Ltd.* [1972] 1 M.L.J. 91 P.C.

(3) *Re Levy, ex parte Walton* (1881) 17 Ch. D. 746.

CIVIL SUIT.

Morris Edgar for the plaintiff.

M. T. Liew for the defendant.

Hashim Yeop A. Sani J.: By an agreement (Exhibit P1) entered into in 1966 between the plaintiff and the defendant (a housing developer) the plaintiff purchased an area of land marked as Lot No. S-25 (hereinafter referred to as the "said lot") in the Setapak Garden Housing Estate as described in map annexed to P1. By virtue of the said agreement the plaintiff, *inter-alia*, agreed to repay to the defendant from a certain date a proportion of the total of certain outgoings as hereinafter described, paid by the defendant in respect of the land. The plaintiff alleges that he had repaid (and the defendant had collected) in excess of the amount as agreed and the defendant has failed or refused to refund the said excess to the plaintiff.

The plaintiff claims for a declaration that the defendant was only entitled to collect quit rent and education rates for the period specified from the plaintiff "only for such amount as the said lot proportionately bears against the whole area excluding areas reserved for roads, open spaces, electrical sub-stations and communal amenities." At the commencement of the hearing the plaintiff left open the amount alleged to be in excess as that would depend on the calculation based on the eventual construction of the agreement to be given by the court.

The defendant denies collecting any sum in excess of the agreement or that the defendant has refused or neglected to repay the said sum alleged to be the excess.

Nothing else in the agreement (P1) seems to be in dispute except the relevant clause relating to such